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**80-1573**

**No.**

**IN THE**

# Supreme Court of the United States

**OCTOBER TERM, 1980**

DANIEL W. GLUESENKAMP,
*Petitioner,*

v.

STATE OF FLORIDA,
*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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## QUESTIONS PRESENTED

1. Whether the Fourth and Fourteenth Amendments permit the arbitrary and unreasonable stopping of certain vehicles that fit into a subjective profile that government officials deem likely to contain products subject to regulation by the Florida Department of Agriculture when there is neither reasonable suspicion nor probable cause to believe the vehicles contain any proscribed products where the state's interest in agricultural regulations does not outweigh the resulting intrusion on the privacy and security of the persons detained.

2. Whether the court below erred in upholding the warrantless search and seizure of a vehicle in the absence of probable cause, exigent circumstances or articulable

suspicion.

3. Whether he court below erred by failing to base its decision on the Motion to Suppress on facts contained in the record.

4. Whether the state statute which allows law officers to arbitrarily stop certain vehicles violates the Fourth and Fourteenth Amendments to the United States Constitution in that:

(a) the classification of regulated vehicles is arbitrary and unrelated to the purpose of the statute in violation of the Equal Protection clause;

(b) the statute violates the Privileges and Immunities and Commerce Clause of the Fourteenth Amendment; and

(c) the statute is vague and overbroad in that it leaves the enforcement of the statute in the unbridled discretion of law enforcement officers and fails to give persons of ordinary intelligence fair notice of the proscribed conduct.

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PETITION FOR A WRIT OF CERTIORARI
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Comes now Petitioner, Daniel W. Gluesenkamp, and respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Florida Supreme Court entered on October 16, 1980, rehearing denied on January 14, 1981.

## OPINIONS BELOW

Petitioner was convicted and sentenced on October 12, 1978 in the Circuit Court of Hamilton County, Florida for possession of cannabis in excess of 100 pounds. On October 16, 1980 the Supreme Court of Florida affirmed the conviction and judgment of the trial court. A copy of this opinion is attached to the Appendix accompanying this Petition as Exhibit A. Rehearing was denied on January 14, 1981. A copy of this order is contained in the Appendix accompanying this Petition as Exhibit B.

## JURISDICTION

In the case below Petitioner challenged the legality of the search and the validity of Florida Statute § 570.15. After pretrial motions raising these issues were denied, pursuant to Florida Criminal Procedure, Petitioner pled nolo contendere while

reserving his right of appeal on these issues.

On February 8, 1978, a two-count information was filed in the trial court charging Petitioner with possession of cannabis in excess of 100 pounds with intent to sell, and possession of cannabis in excess of 5 grams (App. 43)*. Petitioner subsequently entered his written plea of not guilty (Id.).

Thereafter, Petitioner filed a Motion to Suppress Evidence, and a Motion to Dismiss challenging the constitutionality of Florida Statute § 570.15. On June 16, 1978, the trial court denied the Motion to Suppress (T-101), and on July 17, 1978, the trial court entered a written Order denying the Motion to Dismiss (App. 41).

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*"App." refers to the Appendix filed contemporaneously with this Petition. References to the Motions hearing in the Petition are referred to herein as "T".

On July 25, 1978, Petitioner and his counsel appeared before the Circuit Judge, for the purpose of entering a plea of nolo contendere to Counts I and II of the information, expressly reserving and preserving his right to appeal the trial court's denial of the Motions to Dismiss and Suppress.

On October 12, 1978, the trial court adjudicated Petitioner guilty as charged in the information and imposed a "split" sentence of five (5) years, consisting of eighteen (18) months imprisonment, followed by 3-1/2 years of probation, together with a fine of $5,000.00 (App. 43). Petitioner appealed and on October 16, 1980, the Florida Supreme Court denied Petitioner's appeal (App. 1). A motion for rehearing was denied on January 14, 1981 (App. 38).

Petitioner's Motion to Stay Mandate was denied by the Florida Supreme Court on January 27, 1981 (App. 40), and Petitioner has been incarcerated since February 2, 1981.

The Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particu-

larly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Florida Statutes 570.15 provides:

Access to places of business and vehicles

(1)(a) The commissioner, assistant commissioner, directors, counsel, experts, chemists, agents, inspectors, road-guard inspection special officers, and other employees and officers of the department shall have full access at all reasonable hours to all:

1. Places of business;
2. Factories;
3. Farm buildings;
4. Carriages;
5. Railroad cars;
6. Trucks;
7. Motor vehicles, other than private passenger automobiles with no trailer in

tow, or any vehicle bearing an RV license tag;

8. Truck and motor vehicle trailers;

9. Vessels; and

10. All records pertaining thereto;

used in the production, manufacture, storage, sale, or transportation within the state of any food product; any agricultural, horticultural, or livestock product; or any article or product with respect to which any authority is conferred by law on the department.

(b) If such access be refused by the owner, agent, or manager of such premises or by the driver of such aforesaid vehicle, the inspector or roadguard inspection special officer may apply for and may execute a search warrant, which shall be obtained as provided by law for the obtaining of search warrants in other cases, or may conduct a search of any of the aforesaid vehicles without a warrant pursuant to s.933.19.

(c) Such departmental officers, employees, and road-guard inspection special officers may examine and open any package or container of any kind containing or believed to contain any article or product which may be transported, manufactured, sold, or exposed for sale in violation of the provisions of this chapter, the rules of the department or the laws which the department enforces and may inspect the contents thereof and take therefrom samples for analysis.

(2) It shall be unlawful for any truck or any truck or motor vehicle trailer to pass any official road guard inspection station without first stopping for inspection. A violation of this subsection shall

constitute a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

(3) Every law enforcement officer is authorized to assist employees of the department listed in subsection (1) in the enforcement of subsection (2). Such officer is authorized to stop and detain any vehicle and its driver who has failed to comply with subsection (2) until an employee of the department arrives to conduct the inspection required by law. Such law enforcement officer or a road guard inspection special officer may require the driver to return with his vehicle to the road guard inspection station where the driver failed to stop the vehicle for inspection.

(4) No civil or criminal liability shall be imposed upon any person who is authorized to enforce or assist in enforcement of the provisions of this section and who is lawfully engaged in such activity. Amended by Laws 1975, c. 75-215, § 1, eff. July 1, 1975; Laws 1978, c. 78-180, § 1, eff. June 8, 1978; Laws 1979, c. 79-371, § 1, eff. July 3, 1979.

## STATEMENT OF THE CASE

Florida Statutes 570.15 (1977) (supp. 1978) allows the commissioner of the Florida Agriculture Department and his employees and agents "access at all reasonable hours"

to all trucks, truck and motor vehicle trailers and motor vehicles, other than private passenger automobiles with no trailer in tow or any vehicles bearing an "RV" license tag. Cars, recreational vehicles and vans equipped as recreational vehicles are exempt. All vehicles that fall within the proscription of the statute must stop at all Inspection Stations along Florida highways (Fla. Statutes 570.15 and 933.19); but absent probable cause and exigent circumstances the statute does not allow a search. Gluesenkamp v. Florida, slip opinion (App. 1).

Petitioner was a passenger in a 1975 GMC van when he was stopped by an employee of the Florida Department of Agriculture (T-29, 32, 79, 89). Florida Agriculture Inspector Perry, as he saw the van drive past the inspection station on Interstate

75 North, made a determination that the van was not a car, recreational vehicle, nor a van equipped as a recreational vehicle (T-26, 27, 28, 29, 36). The van had an Indiana tag where it was properly licensed (T-79). To avoid having to stop at the Florida Inspection Station would have necessitated that it have a Florida "RV" tag. Vans can qualify for Florida "RV" tags. Florida Statutes § 570.15 (App. 48, 50).

Inspector Perry testified that in a normal eight hour shift hundreds of vehicles go by the station and do not stop as required by law (T-38). Perry said that about half of all trucks and 85% of all vans do not stop at the inspection station (T-42); however, Perry testified that all vehicles that violate the statute are not stopped. "If I pursued every vehicle I would probably be out there right now.

There is no way you could get every vehicle." (T-39). Perry said the officers are told to use their own judgement and experience in picking which vehicles to stop (T-39). On cross examination he revealed how he makes his decisions concerning which vehicles to stop:

> Q. [Mr. Jenkins] What goes into that choice? How do you pick and choose out of all those vehicles in violation of the law, how do you pick and choose which ones you are going to actually chase down?

A. [Inspector Perry] It all depends on how everything is situated there at the station. If I'm not busy. If there's not too many trucks on the ramp at the time. If we have everything that we suppose to do done. But everything was slow that day.

Q. But what I'm going at, Mr. Perry, when you've got a bunch of vehicles to choose from that are in violation of the law, you've got to exercise some choice as to certain vehicles, and what I want to know is what in your mind goes into choosing which vehicle to stop?

A. In my mind, is the ones like the panel type vans, or the ones that you couldn't see through. The ones that's got cur-

tains around it and sitting down pretty low.

Q. Not being able to see in it and sitting low are important factors?

A. Right. (T-39).

Perry said that even 60% of those vehicles he does stop do not have proscribed products in their van (T-44).

Cain, the driver of the van when stopped by Inspector Perry, indicated she was not aware that the type of vehicle they were riding in, a GMC van, was required to stop at the station (T-49, 50). This confusion clearly had a rational basis as Perry testified the signs on Interstate 75 notifying the public of the inspection requirements were as follows:

A: [Inspector Perry] The first sign states "Agricultural Inspection Station'. And then the next sign states, 'All trucks and all trailers stop for inspection.' Then the third sign says, 'All trucks and all trailers' and got an arrow pointing at the exit (T-28).

Perry admitted that the signs did not say anything about "vans" (T-43). Yet when Perry stopped Petitioner's vehicle, he described his actions as follows:

> A: [Inspector Perry] I asked her, I said 'Ma'am you failed to stop for the inspection station back there about two miles. And all trucks and trailers and vans, which are considered as trucks, are required to pull in for inspection' (T-29).

Inspector Perry, using an official Florida Department of Agriculture automobile with flashing blue-light, had stopped the vehicle approximately two (2) miles north of the Inspection Station (T-28-29). At the time, Inspector Perry was wearing his official Florida Department of Agriculture uniform with hat, badge and service revolver (T-47-48). Cain had observed the flashing blue-light mounted atop Inspector Perry's vehicle, and immediately pulled

over to the right side of the highway and stopped the vehicle (T-29).

Perry advised Cain that she had failed to stop at the Inspection Station, and she indicated that she was not aware that a van had to stop at the Inspection Station (T-50). Inspector Perry then asked Cain if he could look in the back of the van to see what she was hauling. Cain responded that she was hauling plants. Perry then asked her if she had the "papers on the plants" (T-50).

Cain returned to the van and apparently had a brief conversation with Petitioner. She and Petitioner returned to Perry and she advised Perry that the van was not hauling plants. At that point, Petitioner advised Perry that they were hauling potting soil (T-30). The paperwork apparently was not produced. Perry again inquired if

he could look into the rear of the van, and received a negative response from Petitioner (T-31).

Perry then advised Cain and Petitioner that they would have to return to the Inspection Station with him for inspection (T-31), a distance of approximately ten (10) miles from the location where the van was originally stopped (T-37).

In order to return to the Inspection Station, it was necessary to proceed on the northbound lane to the next exit. Cain stopped the van at a store located at the exit interchange and advised Inspector Perry that she wanted to use the restroom. Inspector Tom Delegal, the shift manager of the Inspection Station who had responded to a radio call from Perry for "back-up" assistance advised Cain that there were facilities back at the Inspection Station

(T-31). Delegal then asked Petitioner if he (Delegal) could take a look into the rear of the van. Again, Petitioner responded in the negative (T-81).

After a brief delay, Petitioner, Cain and the Inspectors returned to the Inspection Station. Again, Inspector Perry asked if he could look into the rear of the van, and again he received a negative response (T-33).

Thereafter (approximately 35 minutes after stopping the van) the caravan arrived at the southbound Inspection Station and Inspector Perry placed Cain under arrest for failure to stop for inspection, a violation of Florida Statutes § 570.15 (2) (T-33, 59). Both Cain's and Petitioner's drivers licenses were taken from them, and they were placed in the Inspection Station (T-84). Perry's actions effectively se-

cured the van, located some 50 yards away (T-83), as Perry related on cross-examination:

Q: [Mr. Jenkins] So, with your consent, he (Appellant) couldn't have gotten in that van and driven off?

A. (Inspector Perry): That van couldn't go no where.

Q. Why couldn't the van go any place?

A. Because I had to find out what was on it before I even let it go (T-58).

After placing Cain under arrest and detaining Petitioner and the van, Perry contacted his Supervisor, Garth Nobles, at his home in Live Oak, Florida, some twenty (20) miles from the Inspection Station (T-59). In turn, the Hamilton County Sheriff's Office was contacted, and that office asked Charles Tompkins, an Investigator with the State Attorney's Office, to accompany Deputy Sheriff Frank Copeland to the Inspection Station to assist in handling the sit-

uation (T-4). Tompkins then contacted Bob Dekle, an Assistant State Attorney in Lake City, Florida and requested that Dekle go to the Inspection Station to advise the law enforcement officers in their handling of the situation, (T-11), and to help in obtaining a search warrant (T-31).

Approximately 45 minutes after Perry contacted him, Nobles arrived at the Inspection Station (T-50). Shortly thereafter, Tompkins arrived, and Dekle arrived approximately 10 to 15 minutes later (T-13).

When Tompkins arrived, he immediatley approached the van and attempted to open it (T-62-63). Finding the door locked, he attempted to look into the van through the window on the passenger's side of the van. Because the glare from the sun on the window made it impossible, Tompkins could not

see inside the van. Therefore, he placed his head against the window and shielded his eyes with his hands in order to look into the van (T-13-14).

Tompkins testified he was able to see inside the van. Tompkins testified he saw a blanket tied on a string behind the seats (T-5), and according to his testimony, because the blanket had slipped away some four or five inches from the passenger side of the van, he was able to see burlap-colored plastic bags in the rear of the van (T-15). Although he could not see what the opaque bags contained, based upon past experiences, Tompkins stated he knew such bags to contain marijuana (T-5). In addition, Tompkins testified he could smell the odor of marijuana emanating from a closed door of the van, by placing his nose up against the door (T-5). He said that he

intentionally began sniffing for marijuana and he smelled it when he came to the door (T-16). Although Tompkins testified on the Motion to Suppress hearing that he told the other officers immediately that he smelled marijuana, he admitted that on a previous occasion he testified, under oath, that the first time he told anyone about smelling marijuana was some three (3) months after the arrests (T-18). Moreover, Tompkins testified that the entire case file of his office (which contained his written report from the day of the incident) had been lost and that the copy of the statement normally submitted to the State Attorney's Office was likewise "missing" (T-18, 21).

Assistant State's Attorney Dekle testified that when he arrived on the scene, he approached the van and was told that he would be able to see the bags by looking

through the passenger window. Because of the glare from the sun, he could not see into the van even with the aid of a coat he held up to shield the sun's glare. Dekle, the investigator, then moved to the windshield of the van, and by having the coat held over the passenger's window and placing his face against the windshield and using his hands as an additional shield, Dekle testified he observed a drawn curtain across the back of the van, behind the seats, and a gap of 6 to 12 inches between the curtain and the left, or driver's side of the vehicle (T-74). Dekle testified he could see through the gap and observed two (2) bags, which he believed to contain marijuana (T-21).

Significantly, Inspector Perry, the officer who originally stopped and detained the vehicle and its occupants, gave yet an-

other version of what could be seen or smelled from outside the vehicle. Perry testified that "the only way you could see in it was from the front" (T-33-34). As to the cargo area behind the curtain, Perry stated:

> A: [Inspector Perry] I couldn't see inside the vehicle. As far as I could see was where the passenger and the driver's seat was. That's as far as I could see. They had a curtain up to shield off the rest of it (T-34).

Perry was likewise unable to perceive the same smell of marijuana that Tompkins was able to obtain, despite Perry being as close as one or two feet from the van at times (T-64). After failing to observe the area behind the curtain, Perry was ordered by the other officers to return to the station and complete his paper work (T-34, 64).

After Dekle, Tompkins, Deputy Copeland and Nobles had been at the inspection Station examining the vehicle for approximatly 30 to 45 minutes (T-62), Tompkins and Dekle entered the Inspection Station and asked Petitioner who owned the van. Petitioner indicated that he was the owner (T-65).

Dekle then told Tompkins that he felt there was probable cause to believe there was marijuana in the van solely on the basis of seeing the burlap bags, and because it was a vehicle, he did not think it would be necessary to obtain a search warrant (T-72). Dekle made it clear that any smell of marijuana did not enter into his probable cause determination (T-71-73). Tompkins then asked the Petitioner for the keys to the vehicle. Again, Petitioner stated that he was not giving permission to search the van (T-7). Tompkins told Peti-

tioner that his permission was not needed because he (Tompkins) was going to search the van even if he had to "pull the door off it" (T-7, 73, 87). Tompkins then assured Petitioner that the act of giving him the keys would not be considered as a consent to search the vehicle (Id.)

Petitioner gave the keys to Tompkins (T-8), who proceeded back to the van, and in the presence of Deputy Copeland, Inspector Perry and Dekle, opened the van, and saw the bags in the rear of the van (T-8). Marijuana was not in plain sight and was not seen until Tompkin opened, and looked into one of the bags and saw what he believed to be marijuana (T-8). Shortly thereafter, Deputy Copeland arrested Cain and the Petitioner, and transported them to the Hamilton County Jail (T-8).

The trial court upheld the statute, saying:

> That section 570.15 of the Florida Statutes is constitutional and that said statute does not generally or as applied to the facts of this case, deprive petitioner of due process or equal protection of the laws. (App.41).

The trial court found probable cause for the search (T-100).

The Florida Supreme Court upheld the validity of the statute applying the "conventional standard" since it found the statute "does not infringe upon any fundamental rights...but is a valid exercise of the police power." (App. 24). The court rejected Petitioner's equal protection arguments although admitting that only "some vans" fall within the statutory definition of a truck and that the distinction was clear and not vague for indefiniteness (App. 13, 14):

> Vans designed to carry cargo are trucks and are required to stop at Agricultrual Inspection Stations. Vans described as passenger vehicles are not. (App. 16).

As to the search and seizure the Florida Supreme Court found probable cause:

> We believe, however, that the conduct of Cain and Gluesenkamp in illegally proceeding past the inspection station, together with the contradictory statements they made to the inspection officer regarding their cargo, provided probable cause supporting the limited intrusion by the law enforcement officers who subsequently arrived, looked in the van's windows, and saw the bundles which strongly suggested to them the presence of contraband (App. 28).

The Court found that Petitioner had the keys and could have driven away thereby affording exigent circumstances (App. 30). Smell was not a factor in its decision.

In ruling, the Florida Supreme Court held the purpose of the statute was investigatory, not regulatory:

> The reason for requiring certain vehicles to stop at the inspection stations is <u>to allow the inspectors a little time</u>

in which to decide if there is probable cause for searching. Once a determination is made, a search should either be made or the driver should be allowed to continue. The fourth amendment prohibits unreasonable seizures as well as unreasonable searches. Detaining a driver and his vehicle for an inordinate amount of time is an unreasonable seizure. If the inspector is unsure of whether sufficient probable cause exists, he may detain the vehicle and seek assistance as was done in this case.

The seizure in this case was not unreasonable. Although close to two hours had passed from the time the vehicle was stopped to the time it was searched, there was no evidence of undue delay. Most of the time was spent in contacting and waiting for a deputy sheriff and an assistant state attorney, men who were more qualified to decide if sufficient probable cause existed. (App. 31) (Emphasis supplied).

## REASONS FOR ALLOWING THE WRIT

1. THE DECISION BELOW IS CONTRARY TO THE DECISIONS OF THIS COURT AND THE UNITED STATES CONSTITUTION IN THAT IT UPHOLDS A SEIZURE AND SEARCH BASED ON THE ARBITRARY AND UNREASONABLE STOPPING OF PETITIONER'S VEHICLE THAT FIT A SUBJECTIVE PROFILE OF VEHICLES THE GOVERNMENT DEEMED LIKELY TO CONTAIN PRODUCTS SUBJECT TO REGULATION BY THE FLORIDA DEPARTMENT OF AGRICULTURE WHEN

THERE WAS NEITHER REASONABLE SUSPICION NOR PROBABLE CAUSE TO BELIEVE THE VEHICLE CONTAINED ANY PROSCRIBED PRODUCTS WHERE THE STATE'S INTEREST IN AGRICULTURAL REGULATIONS DID NOT OUTWEIGH THE RESULTING INTRUSION ON THE PRIVACY AND SECURITY OF THE PERSONS DETAINED.

Stopping a vehicle and detaining its occupants constitutes a seizure within the meaning of the Fourth and Fourteenth Amendments "even though the purpose of the stop is limited and the resulting detention quite brief". Delaware v. Prouse, 440 U.S. 648, 653 (1979). The essential purpose of the proscription of the Fourth Amendment is to impose a standard of reasonableness upon the exercise of discretion by government officials, in order "to safeguard the privacy and security of individuals against arbitrary invasions." Marshall v. Barlow's, 436 U.S. 307, 312 (1978),

citing Camara v. Municipal Court, 387 U.S. 523, 528 (1967).

> Thus, the permissibility of a particular law-enforcement practice is judged by balancing its intrusion on the individuals' Fourth Amendment interests against its promotion of legitimate governmental interests. Implemented in this manner, the reasonableness standard usually requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement against "an objective standard," whether this be probable cause or a less stringent test. In those situations in which the balance of interests precludes insistence upon "some quantum of individualized suspicion," other safeguards are generally relied upon to assure that the individuals reasonable expectation of privacy is not "subject to the discretion of the official in the field". Delaware v. Prouse, supra, at 654, quoting Camara v. Municipal Court, supra, 387 U.S. at 532.

The stop of Petitioner's vehicle in the instant case was completely and totally arbitrary. The use of the statute here was not regulatory but investigatory (App. 31). The inspector who stopped the vehicle said that 85% of all vans do not stop at the

station but that the inspectors do not detain every vehicle that does not stop. Instead they arbitrarily decide which vans to stop looking for such factors as panels, curtains, windows, ones that set down low (T-39).

The holding in Delaware v. Prouse, supra, at 661, is applicable here:

> This kind of standardless and unconstrained discretion is the evil the Court has discussed when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent. Id.

In Almeida Sanchez v. United States, 413 U.S. 266 (1973) this Court was faced with the exact situation presented by Petitioner herein--a statute authorizing the stopping of vehicles that were within 100 miles of the United States border without any showing of probable cause. The instant case involves a statute authorizing the stopping of all vehicles except cars and recrea-

tional vehicles, again without regard to the existence of probable cause. The purpose of the statute in the Almeida Sanchez case was to stop the flow of illegal aliens. The purpose of the statute here is to stop the flow of illegal agricultural products. Stephenson v. Department of Agriculture and Consumer Services, 329 So. 2d 373 (Fla. 1976). In Almeida-Sanchez, this Court ruled that neither "a stop and search of a moving automobile can be made without a warrant", probable cause or consent. Id., 413 U.S. at 269, going on to state:

> Since neither this Court's automobile search decisions nor its administrative inspection decisions provide any support for the constitutionality of the stop and search in the present case, we are left simply with the statute that purports to authorize automobiles to be stopped and searched, without a warrant and within a reasonable distance from any external boundary of the United States. Id., at 272.

This Court went on to delineate the narrow circumstances under which vehicle stops and searches might be permissible:

> But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless 'there is known to a competent official, authorized to search, probable cause for believeing that their vehicles are carrying contraband or illegal merchandise.' Id., at 274.

Here as in Delaware v. Prouse, supra, at 661, the purported state interest in regulation does not outweigh the constitutional infringements resulting therefrom, as this Court held:

> To insist upon neither an appropriate factual basis for suspicion directed at a particular automobile nor upon some other substantial and objective standard or rule to govern the exercise of discretion "would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches..." Id., quoting Terry v. Ohio, supra, at 22.

These constitutional protections do not disappear simply because a vehicle is subject to state regulations. Cady v. Dombrowski, 413 U.S. 433, 441 (1973). "[I]f the government intrudes...the privacy interest suffers whether the government's motivation is to investigate violation of criminal laws or breaches of other statutory or regulatory standards." Marshall v. Barlow's, Inc., supra, 312, 313. There are certain "relatively unique circumstances" in which consent to regulatory restrictions is presumptively concurrent with participation in the regulated enterprise. Id., at 313. See also, United States v. Biswell, 406 U.S. 311 (1972) (federal regulation of firearms); Collande Catering Corp. v. United States, 397 U.S. 72 (1970) (federal regulation of liquor). Otherwise, regulatory inspections unaccompanied by any quantum of

individualized, articulable suspicion must be undertaken pursuant to previously specified "neutral criteria." Marshall v. Barlow's, Inc., id., at 313.

In fact the statute here is not regulatory but an excuse to allow law enforcement officers to investigate suspect vehicles. As the Florida Supreme Court said: "The reason for requiring certain vehicles to stop at the inspection stations is to allow the inspectors a little time, in which to decide if there is probable cause for searching." (App. 31). The agricultural inspector who stopped the vehicle testified his stop was of an "investigatory nature" (T-38-42). He stated he stopped the vehicle because it fit a subjective profile of vehicles likely to contain proscribed products (T-38-40). Thus it was not

stopped simply because it passed the inspection station in violation of the law.

The facts of this case are similar to United States v. Shaefer, 28 Cr.L.R. 2386, where a Pennsylvania statute authorized law enforcement officials to require the driver of any vehicle to stop and submit to weighing in order to see whether it exceeded weight limitations. In striking down the stop and resultant search and seizure under the statute the Court of Appeals for the Third Circuit found that a general roadblock of all trucks had not been set up and held, citing Delaware v. Prouse, supra, Marshall v. Barlow's, supra, and Camara v. Municipal Court, supra, that "...the Courts will not countenance pretextual use of a regulatory statute for an investigatory purpose unrelated to the

statutory scheme." Shaefer, supra, 28 Cr.L. 2387.

This Court has upheld limited profile searches "...supported at least by a reasonable and articulable suspicion that the person seized is engaged in criminal activity." Reid v. Georgia, ___U.S.___, 100 S. Ct. 2752, 2753 (1980). But here, as in Reid, supra, the agent's belief that Petitioner was violating agricultural laws was no more than an "inchoate and unparticularized suspicion". Terry v. Ohio, 392 U.S. 1, 27 (1968). Here, as in Reid, the circumstances and actions leading to the stop "...describe a very large category of presumably innocent travelers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could

justify a seizure." Reid, supra, 100 S. Ct. at 2754.

2. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE CONFLICTS WITH LOWER COURTS THAT CONTINUE TO ERODE THE FOURTH AMENDMENT'S PROSCRIPTION AGAINST WARRANTLESS VEHICLE SEARCHES AND SEIZURES IN ABSENCE OF EITHER PROBABLE CAUSE OR EXIGENT CIRCUMSTANCES.

Assuming, without admitting, the constitutionality of the Florida Statutes Section 570.15, the warrantless search of the Petitioner's van nearly two (2) hours after it had been stopped by Agricultural Inspector Perry, and after the van had been escorted to the next exit and then back to the southbound inspection station (a distance of approximately ten miles) (T-37), and held, along with Petitioner, for 60-90 minutes until other officers arrived and decided to search the van without warrant, was nonetheless clearly illegal.

A warrantless search is per se unreasonable,and subject only to a few specifically delineated exceptions. Coolidge v. New Hampshire, 403 U.S. 443 (1971); Katz v. United States, 389 U.S. 347, (1967); United States v. Garay, 477 F.2d 1306 (5th Cir. 1973). These exceptions include: (a) a search incident to arrest; (b) the existence of probable cause coupled with exigent circumstances; and (c) the plain view doctrine. In Coolidge this Court said these exceptions "...are jealously and carefully drawn..." id., at 455.

In Chambers v. Maroney, 399 U.S. 42, (1970), this Court restated the necessity for probable cause in warrantless searches of automobiles, and clearly defined the circumstances under which a warrantless search of an automobile is constitutionally permissible.

Application of the foregoing authorities to the facts of this case make it abundantly clear that there were no exigent circumstances which could conceivably justify a warrantless search of the Petitioner's van.

First, Petitioner and Cain were detained in the Inspection Station, under the control of Inspector Perry and other officers (T-57, 58). The van was located some fifty (50) yards from the station (T-83), after it had been stopped on the open highway and escorted approximately ten miles to the station (T-37). As Inspector Perry testified neither the Petitioner nor the van was going to leave until he, Inspector Perry, had found out what was in the van (T-58).

Second, the record reflects that approximately two (2) hours elapsed between the time Petitioner was detained and the time

of the warrantless search of the vehicle (T 59-61, 66).

Third, the Inspection Station where Petitioner and his vehicle were detained was located twelve (12) miles from the City of Jasper, the County Seat of Hamilton County, Florida. Even assuming arguendo the existence of probable cause, any one of several persons (i.e., Inspector Perry, Nobles, Deputy Copeland, Investigator Tompkins, or, especially, Assistant State's Attorney Dekle) had ample opportunity to travel to Jasper (or stop on the way to the scene) to make application for a search warrant. Inspector Perry testified that a Judge was available in Hamilton County for obtaining a search warrant, and that other judges lived in Suwannee County, about eighteen (18) miles away, and in Lake City, about twenty (20) miles away (T-67, 68). Coinci-

dentally, Lake City is the same town which Assistant State Attorney Dekle left to come to the station to assist in the warrantless search (T-70).

Finally, regardless of how the Court resolves the serious inconsistencies between the various versions of seeing or not seeing burlap colored containers (T-15, 34, 71, 73), and smelling or not smelling the odor of marijuana (T-5, 18, 64), it is undeniable from the testimony adduced that the officer who originally seized Petitioner and his vehicle, Inspector Perry, held both on the basis of the fact that (1) the van failed to stop at the inspection station and (2) it "was kind of heavy" (T-27). That officer saw no suspicious packages (T-34) and smelled no odor of marijuana (T-64). Yet the van was held not for the purpose of obtaining a search warrant

which is specifically mandated by the Section 570.15(2), Florida Statutes, but for the arrival of more experienced officers. Assistant State's Attorney Dekle, who made the decision to search made it solely on the fact that he saw burlap bags when he looked through the van's window (T-71-73).

Clearly, the warrantless search failed to meet the requirements clearly set forth by this Court in Coolidge, supra, and Chambers, supra. The decision in Petitioner's case is an important and radical departure from this Court's long line of decisions in this area, and is already being applied by the appellate Courts of Florida to uphold similar searches. See, e.g., Gordon Corbett Brock v. State of Florida, Supreme Court of Florida Case No. 57,718 (March 5, 1981).

3. THE DECISION BELOW IS CONTRARY TO THE DECISIONS OF THIS COURT AND WELL FOUNDED PRINCIPLES OF APPELLATE REVIEW IN THAT THE EVIDENCE FAILS TO SUPPORT THE OPINION OF THE FLORIDA SUPREME COURT.

The decision of the Florida Supreme Court upholding the search rests on factual assumptions by the court unsupported by the record. This factual assumption is critical to a correct application of Fourth Amendment principles. In its opinion the Florida Supreme Court stated:

> The facts in this case are even more compelling; Gluesenkamp, who owned the van, was not the one who was arrested for failing to stop at the inspection station...Since he had the keys, he could have attempted to drive away at any time (App. 30).

But while Petitioner did, indeed, have the keys initially, they were surrendered to the deputy sheriff after being ordered to do so when taken to the inspection station

(T-7, 73, 87). More importantly, Inspector Perry testified Petitioner could not have moved the van, saying "That van couldn't go no place...(b)ecause I had to find out what was in it before I even let it go."(T-58).

The Florida Supreme Court also made a factual determination that an Assistant State Attorney was qualified to make a probable cause determination and that the detention of the van and the Petitioner until he could come on the scene to assess probable cause was legal (App. 31). Such a holding is contrary to the clear holding of Coolidge v. New Hampshire, 403 U.S. 443 (1977) where the Supreme Court held that a state's attorney or law enforcement officials are not qualified to make a probable cause determination: "[P]rosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard

to their own investigations - the 'competitive enterprises' that must rightly engage their single-minded attention." Id., at 450. Even a judicial officer, when he is too close to the events, has been held not to fulfill the role that the Constitution reserves for a neutral and detached magistrate to review probable cause before any intrusion into a protected space. See, Lo-Ji Sales, Inc. v. New York, 447 U.S.319, 327 (1979).

In Petitioner's case the record clearly demonstrates that the officer who originally detained Petitioner's vehicle for failure to stop at the inspection station clearly did not have probable cause to search at the roadside. Both Carroll, supra, and Chambers, supra, at 399 rely heavily on the concept of a car stopped "on the highway" which is "movable" where "the

opportunity to search is fleeting..." Id. Clearly, Petitioner's case does not present an immediate, roadside search by an officer who clearly possessed probable cause. Regardless of any consideration as to probable cause, the law absolutely requires a search warrant as to an immobilized vehicle, removed from the roadway and under the exclusive control of law enforcement authorities. The Supreme Court has clearly held in United States v. Chadwick, 433 U.S. 1 (1979) that where an object comes under police control, exigency ceases to exist, and the officers must get a search warrant. A warrantless search--regardless of how strong the probable cause, see Chadwick, supra--is illegal. In reaffirming Chadwick's holding, the Supreme Court recently emphasized in Arkansas v. Sanders, 442 U.S. 753, (1979):

> But as we noted in Chadwick, the exigency of mobility must be assessed at the point immediately before the search--after the police have seized the object to be searched and have it securely within their control. Id., at 763.

This Court's decision in United States v. United States Gypsum Co., 333 U.S. 364 (1948) long ago established the ground rules for appellate review of fact findings: findings of fact will not be set aside unless "clearly erroneous." "A finding is 'clearly erroneous' where although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Id. at 395. It follows that a "clearly erroneous" ruling is demanded where there is a total absence of evidence. See Duke Power Company v. Carolina Environmental Study Group, 438 U.S. 59 (1978).

Similarly, this Court stated in Roemer v. Board of Public Works of Maryland, 426 U.S. 736 (1976) that "[i]t is not our place, however, to reappraise the evidence, unless it plainly fails to support the findings of the trier of facts." Id. at 758. (Emphasis added).

The Court below violated well-founded principles of appelate review by failing to base its opinion on the record in the case as to critical facts related to the search and this Court should issue its writ to reaffirm these principles.

4. THE DECISION BELOW UPHOLDING THE CONSTITUTIONAL VALIDITY OF THE STATE STATUTE WHICH ALLOWS ARBITRARY STOPS BY GOVERNMENT OFFICIALS WITHOUT ARTICULABLE SUSPICION OR PROBABLE CAUSE IS IN CONFLICT WITH DECISIONS OF THIS COURT AND THE FOURTEENTH AMENDMENT, AND CONTRARY TO THE UNITED STATES CONSTITUTION.

Under the Florida Statute § 570.15, as interpreted by the Supreme Court of the State of Florida, vehicles bearing "RV" license plates were exempt from inspection, while vehicles in precisely the same circumstances which do not display "RV" license plates were subject to inspection. The equal protection clause of the Fourteenth Amendment to the United States Constitution has long been held to prohibit unequal treatment of persons similarly situated. In Davis v. Weir, 497 F.2d 139 (5th Cir. 1974) the Court of Appeals quotes Reed v. Reed, 404 U.S. 71, 75 (1971), noting that this Court has consistently and repeatedly explained that:

> ...The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrealted to the objective of that statute. A

> classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' Id., at 144.

Under traditional equal protection analysis, a legislative classification is permissible if it is rationally related to a legitimate state interest, United States Department of Agriculture v. Moreno, 413 U.S. 528, 533 (1973).

Thus, this Court has long held that a law creating distinct classifications without a fair and substantial rational relation to the purposes of the legislation results in a denial of constitutionally guaranteed equal protection of the laws. See Royster Guano Co. v. Virginia, 253 U.S. 412 (1920):

> But the classification must be reasonable, not arbitrary, and not rest upon some ground of difference having a

> fair and substantial relation to the object of the legislation, so that all persons similarly situated shall be treated alike. Id., at 415.

The purpose of § 570.15(1) was construed in Stephenson v. Department of Agriculture and Consumer Services, 329 So.2d 373, (Fla. 1st D.C.A. 1976), wherein that court noted:

> Appellee has full authority under the police power of the State of Florida to conduct agricultural inspections of the vehicles mentioned in the above statutes provided such inspections are made pursuant to the terms of said statutes. The inspections are necessary in order that Appellee may carry out its responsibilities relating to disease control, fruit and vegetable grading and other similar matters required by law, Appellee's regulations and Federal marketing orders. Id., at 376. (Emphasis added).

The effect of the statute was to create a legal distinction in the absence of a significant and meaningful factual difference between those motor vehicles having

"RV" tags and those which do not bear such tags. Assuming that the legislature had a legitimate purpose for regulating the transportation of agricultural products within the State, it has exceeded the permissible limits of the equal protection clause of the Constitution of the United States by classifying those vehicles which are subject to inspection solely upon the basis of whether or not the vehicle bears an "RV" license tag.

The differing treatment of "RV" and non-"RV" licensed vehicles bears no legitimate relationship, rational or otherwise, to the health purposes of the inspection statute. Excluding vehicles registered as recreational vehicles from possible inspection by state officials looking for illicit fruits while subjecting others situated in precisely the same circumstances except for

the license plate on the vehicle, results in a constitutionally deficient disparity of treatment.

The totally unreasonable distinction between motor vehicles with "RV" tags and those without such tags is further revealed in Section 320.06(1)(a), (A) Florida Statutes, which provides in material part:

> Registration license plates and certificates of registration shall be issued to, and remain in the name of, the owner of each vehicle registered and may be transferred by the owner from the vehicle for which the registration license plate was issued to any vehicle which the owner may acquire within the same classification...

Thus, the owner of a fully-equipped truck camper bearing an "RV" license tag can sell his vehicle, purchase a Ford F-150 pick-up truck within the same weight class, and lawfully transfer his "RV" license tag to the truck. Thereafter, he can transport agricultural produce or other cargo, all

without being subjected to an inspection by Florida Department of Agricultural employees--simply because the pick-up truck has an "RV" license tag.

It should be noted that § 570.15(1) and § 570.15(2) were not entirely consistent. Subsection (1) granted access to, among other things, "motor vehicles, other than vehicles bearing an "RV" license tag". Subsection (2) makes it a misdeameanor for any truck to pass an official road guard inspection station without first stopping for inspection.

Due to the transferable nature of motor vehicle license tags in Florida, the owner of an "RV" license tag may affix the same tag to his truck. If that vehicle passed an inspection station without stopping the truck for inspection, he has committed a misdemeanor [i.e., violation of Florida

Statutes § 570.15(2)]; even though Section 570.15(1) expressly exempted the truck from inspection solely because it bore an "RV" license tag.

The question presented herein is whether a state under the guise of it police power may enact such legislation as will seriously burden, hinder and impede the commerce and trade agreement between the states. The statute imposes a duty on every driver, if not occupant, passing along Florida Highways to determine for himself whether it falls within the proscription of the statute in order to escape criminal liability. This the driver must do even though he has no notice nor does the statute define the types of trucks or vans that might fit the proscription.

The right of a citizen to travel from state to state uninhibited by statutes

which burden or unreasonably restrict such movement is a fundamental right. Shapiro v. Thompson, 394 U.S. 618, 630 (1969). The right to associate freely and "to go where one pleases" are also fundmental rights protected by the First and Fourteenth Amendments. Alladin's Castle, Inc. v. City of Mesquite, 630 F.2d 1029, 1041 (5th Cir. 1980). Because of these fundamental rights, strict scrutiny is called for and the state must demonstrate a compelling interest to justify the classification. Mason v. Lister, 562 F.2d 343, 346 (5th Cir. 1978); Dorough v. Estelle, 457 F.2d 1007, 1010 (5th Cir. 1974).

This statutory classification fails to satisfy even the 'rational basis' test; however, the constitutional infirmity of the statute is even clearer when the stricter test is applied. Not only is

there no substantial or rational basis for the classification, but even if some rational basis were to be arguably present, the requisite "compelling state interest" could not be found.

The vehicle in the instant case was a van without an "RV" license tag. The vehicle was registered and properly licensed in the State of Indiana (T-79). Thus, the statute's classification offends the Constitution, as the effect of the application fo the statute to Petitioner was to subject him to inspection on the basis of his vehicle license not being from Florida, or to punish an interstate traveler for not re-licensing his vehicle in the visited state.

The citizens of each state shall be entitled to all privileges and immunities of the citizens in the several states, and of

the United States. Article IV, Section 2, Fourteenth Amendment. As discussed infra, freedom to move from state to state is a fundamental liberty. Edwards v. California, 314 U.S. 160 (1941). In Ward v. Maryland, 12 Wall 418, 430 (1870), the Court concluded that the commerce clause "... plainly and unmistakeably secures and protects the rights of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade or business without molestation."

The lack of a precise definition of recreational vehicles in the statute leaves the stopping of vans within the unbridled discretion of the law enforcement officers. Decisions on who to stop cannot be left in the unfettered discretion of law enforcement officials "because it encourages

arbitrary and erratic arrests and convictions." Papa- christou v. City of Jacksonville, 405 U.S. 156, 162 (1972). This practice of leaving who to stop in the hands of law enforcement officials was condemned in Delaware v. Prouse, 440 U.S. 648 (1979):

> This kind of standardless and unconstrained discretion is the evil the Court has ddiscussed when in previous cases it has insisted that the discretion of the officials in the field be circumscribed at least to some extent. Id., at 661.

In a vehicle of the type Petitioner was driving due to the fact it was licensed by another state, how could the state tell whether it was a recreational vehicle or cargo van unless the unwarranted intrusion and stop was followed by an unwarranted look inside the van?

The definition of a crime is the exclusive function of the legislature and the exercise of such unfettered and unqualified

discretion in construing statutes cannot be left in the hands of law enforcement officers or jurors. Giaccio v. Pennsylvania, 382 U.S. 399 (1966).

> It is well established that a law fails to meet the requirements of Due Process clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without legally fixed standards, what is prohibited and what is not in each particular case." Id.

The constitutional deficiency of the statutes here is similar to the statutes struck down by the Court in Cox v. Louisiana, 379 U.S. 536, 579 (1965):

> Such a statute does not provide for government by clearly defined laws, but rather for government by the moment to moment opinions of a policeman on his beat.

Imperative to the proper construction of the statute here is the Supreme Court's holding in Cramp v. Board of Education, 368 U.S. 278, 287 (1961): "...the vice of unconstitutional vagueness is further aggra-

vated where, as here, the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the constitution."

The statute here "...fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden the statute." United States v. Harris, 347 U.S. 612, 617 (1954). All persons "are entitled to be informed as to what the State commands or forbids." Lanzetta v. New Jersey, 306 U.S. 451, 453 (1938). As argued infra, a driver of a van does not know he falls within the proscription of the statute nor is he given notice that he must stop at the inspection station.*

*Florida Statutes § 570.15 has been amended since Petitioner's conviction, and subsection 7 now reads: "Motor vehicles, except private passenger automobiles with no trailer in tow, travel trailers, camping trailers, and motor homes as defined in § 320.06(1)(b).

Lanzetta is but one of a long established line of cases insisting that the law give fair notice of the offending conduct. See Cline v. Frink Davis Co., 274 U.S. 445 (1928); United States v. L. Cohen Grocery Co., 255 U.S. 81 (1920).

The statute here is to be judged by the principles set out in Papachristou v. City of Jacksonville, 405 U.S. 156 (1972). Here, as in Papchristou, the statute proscribes activities which by prevalent standards is normally innocent. There, night walking was proscribed. Here, driving a cargo van without an "RV" tag past an inspection station is proscribed. Just as "walkers and strollers and wanderers may be going to or coming from a burglary" id., 405 U.S. at 844, occupants of vans might be carrying illegal fruit or other contraband, but as the Court said in United States v. Reese, 92 U.S. 214 (1871):

> It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." Id., at 221.

"[C]riminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed." United States v. National Dairy Products, 372 U.S. 29, 32 (1963).

While the sign at the interstate said "all trucks" must stop, the state concedes passenger trucks and recreational vehicles are not trucks within the meaning of the Florida statute. "Words which are vague and fluid...may be as much of a trap for the innocent as the ancient laws of Caligula." United States v. Cardiff, 344 U.S. 174, 176 (1953). Florida authorities stated that they have the most trouble with getting vans to stop at inspection stations (T-71-73). Numerous Supreme Court

decisions have struck down both criminal and regulatory schemes upon a finding that "men of common intelligence must necessarily guess at is meaning and differ as to its application." Connally v. General Construction Company, 269 U.S. 385, 391, (1926). See also, United States v. Mersky, 361 U.S. 431, (1960); M. Kraus and Brothers v. United States, 327 U.S. 614, (1946).

## CONCLUSION

For the foregoing reasons, Petitioner respectfully reuests that this Court issue a writ of certiorari to review the judgment of the Florida Supreme Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have sent a copy of the foregoing Petition for Writ of Certiorari to the Florida Supreme Court upon the Florida State's Attorney, Jim Smith, The Capitol, Tallahassee, Florida.

This 16th day of March, 1981.

JAMES K. JENKINS